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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL AUTO PARTS CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

DEFENDANTS' OBJECTION TO, AND MOTION TO REVERSE IN PART AND MODIFY, THE SPECIAL MASTER'S ORDER GRANTING IN PART AND DENYING IN PART AUTO DEALER PLAINTIFFS' MOTION FOR PROTECTIVE ORDER CONCERNING RULE 30(B)(6) DEPOSITIONS OF AUTO DEALER PLAINTIFFS

Defendants respectfully object to the Special Master's December 29, 2015 Order concerning the topics for Rule 30(b)(6) depositions of Auto Dealers and request that the Court reverse the Special Master's ruling on Topics 7, 8, 11(c), and 11(g), as set forth in the accompanying Proposed Order (Exhibit A). Defendants rely on the attached Memorandum of Law in Support of their motion.

As required by Local Rule 7.1(a), counsel for Defendants attempted to meet and confer with counsel for Auto Dealers and were unable to obtain Auto Dealers' concurrence in the relief sought in this motion.

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Respectfully submitted,

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In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL AUTO PARTS CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' OBJECTION TO, AND MOTION TO REVERSE IN PART AND MODIFY, THE SPECIAL MASTER'S ORDER GRANTING IN PART AND DENYING IN PART AUTO DEALER PLAINTIFFS' MOTION FOR PROTECTIVE ORDER CONCERNING RULE 30(B)(6) DEPOSITIONS OF AUTO DEALER PLAINTIFFS

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CONCISE STATEMENT OF THE ISSUES PRESENTED

Whether certain portions of the Special Master's December 29, 2015 Order on Auto Dealers' challenge to Defendants' notice for Rule 30(b)(6) depositions of Auto Dealers—namely the portions striking from the notice Topics 7, 8, 11(c), and 11(g), which seek testimony about (1) the revenue and profit each Auto Dealer earned on its purchases and sales or leases of new vehicles during the class period and (2) the markets in which each Auto Dealer purchased and sold or leased new vehicles and its competitors in those markets—constituted legal error and an abuse of discretion.

Answer: Yes.

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STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 30(b)(6)

In re Class 8 Transmission Indirect Purchaser Antitrust Litig., 2015 WL 6181748 (D. Del. 2015)

In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2010)

Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416 (5th Cir. 2004)

In re Methionine Antitrust Litig., 204 F.R.D. 161 (N.D. Cal. 2001)

In re Processed Egg Products Antitrust Litig., 2015 WL 6964281 (E.D. Penn. Nov. 10, 2015)

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INTRODUCTION

Defendants respectfully object to the portions of the Special Master's December 29, 2015 Order ruling that Defendants are not entitled to Rule 30(b)(6) deposition testimony with respect to four topics in the notice served on Auto Dealers. These topics seek testimony on facts critical to both the merits of Auto Dealers' claims as well as class certification: whether and to what extent any alleged overcharges that were passed on to Auto Dealers by OEMs or other upstream intermediaries were absorbed by Auto Dealers, rather than being passed on in turn by Auto Dealers to their customers.

First, the Order erroneously strikes Topic 11(c) from Defendants' 30(b)(6) deposition notice, which seeks testimony about each Auto Dealer's revenue and profit margins on its sales and leases of new vehicles. The amounts and variations over time of each respective Auto Dealer's profit margins are important factors for assessing the existence and extent of pass-on of any alleged overcharge from dealer to consumer. Among other things, Defendants need to be able to probe whether and to what extent each Auto Dealer's profit margins changed from sale to sale and over time and to explore whether such changes can be attributed to factors other than the alleged overcharge.

Second, the Order also erroneously strikes Topics 7, 8, and 11(g), which call for testimony concerning each Auto Dealer's knowledge about the identities and locations of its competitors and the markets in which it operated during the class period. The degree and nature of competition that each Auto Dealer faced in its respective markets over time is, like profit margin, an important component of any determination of whether and to what extent the Auto Dealer was able to pass on, rather than absorb, any alleged overcharge and therefore are highly relevant both to the merits of Auto Dealers' claims and whether they may represent a class.

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Not only were the Special Master's decisions granting Auto Dealers' motion for a protective order with respect to providing witnesses to testify under Rule 30(b)(6) on these topics wrong, but he either offered no rationale at all for his decisions, or offered reasoning that, on its face, is unsupportable and clearly incorrect. His decisions therefore should be reversed.

The importance of correcting these erroneous decisions cannot be overstated. In these cases, each named Auto Dealer bears the burden of demonstrating that it suffered an injury under the antitrust laws as a result of the alleged conspiratorial conduct and, if so, the further burden of quantifying that injury for purposes of assessing any damages. Critical to these inquiries are whether any alleged overcharge was passed on to each named Auto Dealer and whether (and to what extent) each named Auto Dealer then absorbed that overcharge rather than passing it on to others down the line, such as consumers who purchased cars. Further, given that the named Auto Dealers are seeking to represent classes of other auto dealers, the named Auto Dealers also bear the burden of demonstrating that any alleged injury to each putative class member can be demonstrated through evidence common to the class. The discovery that defendants seek on the four topics that the Special Master erroneously struck from the Rule 30(b)(6) deposition notice to Auto Dealers is at the core of these inquiries.

BACKGROUND

On December 29, 2015, the Special Master entered an order (12-md-02311, ECF No. 1169) granting in part and denying in part Auto Dealers' Motion for Protective Order regarding the topics that Defendants had designated for Rule 30(b)(6) depositions of eleven of the named Auto Dealer Plaintiffs. *See* Ex. B, Defendants' 30(b)(6) Notice. The Special Master correctly ruled that the majority of the topics listed in the deposition notice are relevant and appropriate. But the December 29 Order erroneously ruled that certain topics, described more

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fully below, were not appropriate in a 30(b)(6) notice and granted Auto Dealers' motion for protective order with respect to those topics.

As previously ordered by the Special Master and affirmed by the Court, Defendants across all of the cases in the MDL have been limited (absent good cause) to only a single Rule 30(b)(6) deposition of each Auto Dealer Plaintiff, each lasting no more than seven hours. Auto Dealers, however, made clear from the moment that Defendants served the deposition notice that they would try to avoid providing any Rule 30(b)6) testimony at all, and within three weeks of receiving that notice Auto Dealers objected to each and every topic listed in the notice.

Between November 11 and 18, 2015, Defendants conducted three lengthy meet-and-confer sessions with Auto Dealers in an effort to negotiate a narrowed list of topics, and, in that context, Defendants repeatedly agreed to pare back or drop altogether a number of the initially noticed topics. Despite Defendants' efforts to reach a compromise on the Rule 30(b)(6) notice, on November 25, 2015, Auto Dealers filed a forty-nine page Motion For Protective Order seeking to block or limit every topic that remained in Defendants' greatly narrowed notice. *See* Dealership Pls.' Mot. For Protective Order (12-md-2311, ECF No. 1144). In his decision, the Special Master ruled, with almost no explanation, that Defendants are not entitled to Rule 30(b)(6) testimony from Auto Dealers with respect to the following four topics:

- **Topic 7:** Each Auto Dealer's knowledge of its "competitors, including but not limited to their locations, businesses, pricing of new vehicles, and market share," which the Special Master struck on the ground that it "calls for pure speculation";

- **Topic 8:** Each Auto Dealer's "knowledge of the marketplace for new vehicles, including price trends for such products during the relevant timer period," which the Special Master also struck on the grounds that it "calls for pure speculation" and is an "inquiry . . . more appropriately addressed to Plaintiffs' experts";

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- **Topic 11(c):** Each Auto Dealer's "sales and leases of new vehicles, including . . . [its] revenue, profit margins and profit on new vehicles sold or leased (*i.e.*, front end)," which the Special Master struck without any explanation at all; and

- **Topic 11(g):** Each Auto Dealer's "knowledge of similarities or differences between Your sales and leases and the sales and leasing behaviors of other automotive dealerships," which the Special Master struck without any explanation at all.

LEGAL STANDARD

The Special Master's Order on the scope of Defendants' Rule 30(b)(6) notice served on Auto Dealers is a procedural matter and reviewed by the Court under the abuse of discretion standard. *See* Fed. R. Civ. P. 53(f)(5); *Nippon Steel & Sumitomo Metal Corp. v. Posco*, No. Civ. A. 12-2429 DRC, 2014 WL 1266219, at *1 (D.N.J. Mar. 26, 2014) (holding Special Masters' denial of discovery was procedural matter subject to review for abuse of discretion); *see also* Order Appointing a Master (12-md-02311, ECF No. 792) (stating the Court reviews objections to the Special Master's Orders pursuant to Fed. R. Civ. P. 53(f)). An erroneous decision denying discovery that results in substantial prejudice to the party seeking discovery constitutes an abuse of discretion. *See, e.g., Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998); *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 903 (6th Cir. 2009); *see also* Fed. R. Civ. P. 53(f) advisory committee's note (2003) ("The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.").

ARGUMENT

The Special Master erred by ruling that Auto Dealers are not obligated to provide witnesses under Rule 30(b)(6) to testify about their revenue and profits from purchasing and selling the vehicles that are the subject their claims, and their knowledge of their competitors and the markets in which they sold and leased new vehicles. The Special Master's December 29, 2015 Order fails

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to set forth any reasoning at all for his decision to strike Topics 11(c) and 11(g) from Defendants' 30(b)(6) notice. With respect to Topics 7 and 8, his conclusions that testimony about each Auto Dealer's "knowledge" of its competitors and the marketplace in which each of them compete "calls for pure speculation" and/or "is more appropriately addressed to Plaintiffs' experts" are, on their face, both illogical and arbitrary. The Special Master's denial of Defendants' ability to take Rule 30(b)(6) testimony of Auto Dealers on topics that are relevant, indeed critical, to this case constituted legal error and a clear abuse of discretion.

A. Auto Dealers' Profit Margins and the Markets in Which They Compete Are Clearly Relevant to Pass-On, Damages, and Class Certification

The areas of inquiry that are the subject of this objection are not simply relevant to this case, but essential to analyzing whether an Auto Dealer absorbed or passed on any alleged overcharge. Auto Dealers are in the middle of the distribution chain; they are neither direct purchasers of the auto parts nor the ultimate consumers of the vehicles in which those parts were incorporated. As Auto Dealers allege in their own Complaints, their claims are premised on the allegation that OEMs passed on some portion of the alleged overcharge to Auto Dealers and that "automobile dealers did not 'pass on' all of the overcharge[]" to their customers. *See, e.g.*, Dealership Third Consol. Class Action Compl. ¶¶ 233–234 (12-cv-00102, ECF No. 218). In at least one iteration of their complaint, Auto Dealers further alleged that their claimed injuries are evidenced by a "sharp[] decline" in their "gross profits on new car sales" during the alleged conspiracy. *See, e.g.*, Dealership Consol. Class Action Compl. ¶ 232 (12-md-2311, ECF No. 085). As a matter of basic due process, Defendants are entitled to depose these Auto Dealers to test these core allegations.

The topics struck by the Special Master are specifically designed to obtain discovery of the "real-world facts surrounding [the] market" in which each of these Auto Dealers operate, which

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courts assessing the fact and extent of pass-on of alleged overcharges in automotive markets have found essential to any evaluation of those issues. *See In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, Civ. No. 11-00009-SLR, 2015 WL 6181748, at *10 & n.14 (D. Del. Oct. 21, 2015); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2010) (vacating class certification of a class of end payor vehicle purchasers because plaintiffs could not rely on market assumption "that any price increase or decrease will always have the same magnitude of effect on the final price paid"); *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (denying class certification of a class of vehicle purchasers because plaintiffs' assumption that an overcharge would be passed on to every customer "defies the realities of the haggling that ensues in the American market when one buys a vehicle").

Tracing an overcharge "through successive resales is . . . famously difficult," *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997), and, as this Court has recognized, "may prove to be impossible to calculate," *In re Auto. Parts Antitrust Litig.*, No. 12-cv-00102, 2013 WL 2456612, at *18 (E.D. Mich. June 6, 2013). It requires consideration of the many factors that influence prices and costs at each level of the distribution chain, including the circumstances of each successive sellers' market. *See In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2015 WL 6964281, at *27–29 (E.D. Penn. Nov. 10, 2015) (refusing to certify a class of indirect purchasers because plaintiffs' expert failed to account for important market factors, including "the effects of geography, competition, pricing strategy, and contract type"). If the market in which Auto Dealers sold and leased vehicles had been perfectly competitive, an economist might be able to quantify the extent to which any overcharge was passed on simply as a function of elasticities in supply and demand. *See* Samid Hussain, et al., *Economics of Class*

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Certification in Indirect Purchaser Cases, 10 Competition 18, 21–23 (2001). Almost all research shows, however, that perfect competition rarely exists in retail markets, and courts and experts have routinely rejected the notion that pass-on can be demonstrated by simple economic theories without real-world facts about the market. *See id*. at 23. For instance, in *Illinois Brick Co. v. Illinois*, the Supreme Court explained that it might be easy to calculate whether an overcharge was passed on to an indirect purchaser if it is assumed that "the market for the passer's product is perfectly competitive; if the overcharge is imposed equally on all of the passer's competitors; and if the passer maximizes its profits." 431 U.S. 720, 741 (1977). The Court noted, however, that:

> [I]n the real economic world rather than an economist's hypothetical model . . . drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.

Id. at 742 (internal quotation omitted).

The underlying factual circumstances of the markets in which each of these Auto Dealers sold and leased the vehicles at issue here, and the level and variation of the profit margins Auto Dealers managed to attain in those markets during the alleged class periods, will be particularly crucial to an empirical analysis in these cases. The market in which consumers purchase and lease new vehicles is one of the most complicated retail markets. The retail car market is "unusual for being a large retail market where consumers pay what are essentially personalized prices." Charles Murry & Henry S. Schneider, *The Economics of Retail Markets for New and Used Cars* 12, in Handbook on the Economics of Retail and Distribution (forthcoming), Ex. M to Defs.' Opp'n to Dealership Pls.' Mot. for Protective Order (12-cv-02311, ECF No. 1156-14). A review of the data and documents Auto Dealers have produced demonstrates that there is a wide variation in the terms and profits on transactions for essentially identical vehicles. In order to understand

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such transactions and their divergent terms, and to determine whether and when Auto Dealers absorbed (rather than passed on) any alleged overcharge, Defendants and their experts need information about the markets in which each Auto Dealer operated.

Foreclosing Defendants' access to information essential to their defenses against Auto Dealers' claims and attempts to certify classes would be reversible error. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) (holding that a defendant in a class action "has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues"); *Credit Lyonnaise SA v. SGC Int'l, Inc.*, 160 F.3d 428, 430–31 (8th Cir. 1998) (reversing and remanding ruling denying depositions; district court's discretion to "limit scope" is restricted by "presumption . . . in favor of full discovery of any matters arguably related" to claim at issue); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 558, 561–65 (7th Cir. 1984) (vacating and remanding for failure to allow deposition of non-party witness, explaining that "there are many Americans who find drug companies in general to be objects they love to hate. This being so, it is the special responsibility of courts to see to it that cases against them at least are fairly presented, and defense not unduly hobbled"); *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 548–50 (10th Cir. 1984) ("denial of discovery" on matters ultimately deemed relevant at trial "is ordinarily prejudicial"; setting aside judgment and remanding for failure to allow deposition testimony on topics ultimately deemed relevant at trial); *W. Elec. Co., Inc. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (granting defendant's request to take relevant class-related discovery because "to deny [a defendant] the right to present a full defense on the issues would violate due process").

Rule 30(b)(6) depositions of Auto Dealers' corporate designees are an appropriate means to obtain each Auto Dealer's knowledge of the respective new vehicle markets in which it

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operated, its competitors in those markets, and its profit margins during the course of the alleged class periods. Rule 30(b)(6) depositions are highly favored because courts "are not aware of any less onerous means of assuring that the position of a corporation that is involved in the litigation, can be fully and fairly explored." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 639 (D. Minn. 2000); *see also Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006) ("[T]he burden upon such a responding entity [under Rule 30(b)(6)] is justified since a corporation can only act through its employees."). They are the best means to obtain the binding admissions of a corporation. *See In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003). This is especially true here, because Defendants across all product tracks have also been limited to a single 30(b)(1) deposition of each Auto Dealer.

B. Auto Dealers' Knowledge of Their Profit Margins (Topic 11(c)) Is a Relevant and Appropriate Line of Inquiry

The Special Master erred in excusing each Auto Dealer from having to prepare and present a witness to testify about Topic 11(c) concerning its so-called "front end" profits: *i.e.*, its revenues, profit margins, and profits on new vehicles sold or leased. In his Order, the Special Master offered no rationale whatsoever for denying this topic. The revenue and profit information Defendants seek to discover through a deposition of each Auto Dealer on Topic 11(c) is relevant to whether pass-on occurred, whether rates of pass-on varied over time, and as an indicator of the degree of competition in the market each Auto Dealer faced (which itself is highly relevant to pass-on analysis).

The amounts of, and fluctuations in, an Auto Dealer's profit margins from buying and selling new vehicles can be indicators of whether and to what extent the Auto Dealer passed on any alleged overcharge, because "[redacted]

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[redacted]" *See* Decl. of Dr. Edward A. Snyder ¶ 14, Ex. 4 to Defs.' Reply in Supp. of Mot. To Establish Schedule for Dealer Pls.' Produc. of ESI (12-cv-00102, ECF No. 305-2). In fact, Auto Dealers' original consolidated amended complaint in *Wire Harnesses* specifically alleged that reductions in their profit margins are evidence that they absorbed overcharges. Dealership Consol. Class Action Compl. ¶ 232 (12-md-2311, ECF No. 085) ("During the conspiracy, (since 2000) auto dealers' gross profits on new car sales declined sharply. . . ."). This Court and others also have recognized that absorption of an overcharge may reduce a seller's profit margin. *See, e.g.*, *In re Auto. Parts Antitrust Litig.*, 2013 WL 2456612, at *9 (finding that OEMs may have "absorb[ed] the overcharges by reduced profit margin on each vehicle . . . ."); *Karofsky v. Abbott Labs.*, No. CV-95-1009, 1997 WL 34504652, at *13 (Me. Super. Oct. 16, 1997) (relying on expert testimony that "different [pass-on] rates could result from the differing profit margins of the product or the retailer"). Indeed, the Special Master himself had previously recognized the "critical" need for Defendants to obtain through depositions of Auto Dealer witnesses an understanding of "how profit is calculated." *See* Hearing Tr., May 6, 2015 at 17:20–25, Ex. E to Defs' Opp'n to Dealership Pls.' Mot. for Protective Order (12-md-02311, ECF No. 1156-6).

Not only did the Special Master offer no reason at all for his decision to strike Topic 11(c), but he simultaneously *denied* Auto Dealers' motion to strike a parallel topic—Topic 11(d), which calls for testimony regarding each Auto Dealer's "revenues, profits and profit margins on financing, insurance, warranty, aftermarket parts, and services (i.e., back-end)"—declaring it "an appropriate area[] of inquiry for a 30(b)(6) witness." December 29 Order at 4. The Special Master's Order therefore requires each Auto Dealer to prepare a witness to testify about changes in its profit margins on insurance and warranties sold in connection with the sale of new vehicles, but

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not to prepare a witness to testify about changes in its profit margins on the sales of vehicles themselves. In fact, Defendants and their experts need to understand the Auto Dealers' profit margins on both ends of these transactions in order to understand whether and to what extent pass-on from each Auto Dealer to its customers occurred.

Auto Dealers' argument that their transactional data provide Defendants with sufficient information regarding their revenues and profit margins on vehicle sales is simply wrong. First of all, these data do not reveal all the factors that may have affected profit margin. Second, the data alone do not answer the question of "*why*" profit margins changed from transaction to transaction or over time. Third, there are gaping holes in Auto Dealers' productions of transactional data. Only four of the more than forty Auto Dealers have produced transactional data that cover the entire time period, and fewer than half of the named Auto Dealers have produced any data at all for periods before 2007. Thus, Rule 30(b)(6) deposition testimony about an Auto Dealer's revenues and profits from new vehicle sales or leases during the time period for which it has not produced data may be the *only* evidence still available regarding its revenues and profits during those periods. Obviously, if any given Auto Dealer has no information regarding its revenues and profit margins during any particular parts of the alleged class periods, the proper outcome is for the entity to provide a witness to so testify, not for the Court to preclude altogether the use of a Rule 30(b)(6) deposition to ask about the topic *at all*.

C. Each Auto Dealer's Knowledge of the Markets in Which It Operated and Its Competitors in Those Markets (Topics 7, 8, and 11(g)) Is Relevant to the Critical Issue of Pass-On

The Special Master also erred in striking from Defendants' deposition notice Topics 7, 8, and 11(g), which seek testimony from each Auto Dealer about the markets in which it purchased and sold and/or leased new vehicles during the alleged class periods and its competitors in those markets. The Special Master identified "pure speculation" as his reason for not requiring Auto

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Dealers to prepare a witness to testify about their "knowledge" about their competitors and the marketplaces in which each of them competed (Topics 7 and 8), and he gave no reason at all for not requiring each Auto Dealer to prepare a witness to testify about its "knowledge of similarities or differences" between its sales or leases practices and those of its competitors (Topic 11(g)). December 29 Order at 3–4.

The Special Master's conclusion that asking an Auto Dealer about its "knowledge" regarding a given subject calls for "pure speculation" is, on its face, unsupportable. Any Auto Dealer presumably will have knowledge about which it could readily testify about who its competitors were during the class period, their locations, their relative market shares, and their marketing practices, as well as the general marketplace in which it operated over time. It is hard to believe that any Auto Dealer that has managed to stay in business for any period of time knows nothing about its competitors and the market in which it is operating. Nonetheless, if in fact any Auto Dealer does not know anything about the market in which it sold and leased vehicles, or who its competitors were, or how they priced vehicles, then the answer to such questions is simply "I don't know."

Neither Defendants' notice nor Rule 30(b)(6) require any Auto Dealer to do more than make a reasonable inquiry to ascertain the facts reasonably known or ascertainable by the Auto Dealer. Thus, the Special Master's refusal to require Auto Dealers to comply with their obligation under Rule 30(b)(6) on the ground that the topic would require them to "speculate" was arbitrary, capricious, and an abuse of discretion. *See QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012) ("If a corporation genuinely . . . does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations [to prepare for a deposition] under the Rule cease.").

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Nor should an Auto Dealer be permitted to avoid designating a witness to testify about its "knowledge of the marketplace" because (as the Special Master held with respect to Topic 8) "[t]his inquiry is more appropriately addressed to Plaintiffs' experts." December 29 Order at 4. First, Auto Dealers have no obligation even to *designate* an expert to testify about the markets in which each of them operated during the class period. Second, even if each of them do designate such an "expert," Defendants are entitled to explore the actual *facts* known to each Auto Dealer, not merely the "*opinions*" to which some "expert" decides to testify.

The extent of competition with other auto dealers is a key factor in setting prices and is highly relevant to the individual claims raised by Auto Dealers and End Payors, as well as to the issue of class certification. *See In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090 ADM/AJB, 2012 WL 3031085, at *10 (D. Minn. July 25, 2012), *aff'd*, 752 F.3d 728 (8th Cir. 2014) (denying certification of a class of retailers in an antitrust action brought against wholesalers because there were too many individualized factors affecting pricing, including the "local competitive market" and "proximity to [a] strong local competitor"). While Auto Dealers' own data may provide some insight into their own pricing practices, those data are very incomplete (as noted above) and in any event say nothing at all about how Auto Dealers' prices may have been affected by external market forces, such as the presence or absence of fierce competition from nearby auto dealers.

In addition, the degree of competition faced in each Auto Dealer's respective market is a necessary input in any empirical overcharge analysis. The degree of competition in a given market is relevant to whether any overcharge was passed on to an end user. *See e.g., In re Processed Egg Products Antitrust Litig.*, 2015 WL 6964281, at *27–29 (crediting expert analysis that "local competition heavily influences pricing decisions of retailers and . . . any accurate measure of

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overcharge would require accounting for the effects of geography, competition, pricing strategy, and contract type"); *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 165 (N.D. Cal. 2001) (rejecting assumption that degree of pass-on can be calculated by economic formula because "the evidence demonstrates that resellers do not act uniformly and that they operate in different markets with different competitive pressures"). The best and most effective way for Defendants to discover the degree of competition each Auto Dealer faced during the class period (and whether the level of competition faced by each Auto Dealer varied over time and varied among Auto Dealers from different geographical areas) is to ask each Auto Dealer to designate a witness to testify about its knowledge about these matters in its deposition. Similarly, market trends may affect pricing and pass-on. For instance, when gas prices increase, an auto dealer may not be able to increase prices on SUVs. Deposition testimony is the only way Defendants can discover Auto Dealers' knowledge of their competitors and the market to ascertain whether any increases or decreases in prices and profits were a result of their absorbing any alleged overcharges rather than other market forces.

CONCLUSION

For all of these reasons, Defendants respectfully request that the Court reverse portions of the Special Master's decision granting Auto Dealers' Motion for Protective Order with respect to Defendants' deposition notice Topics 7, 8, 11(c), and 11(g).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2016, I caused the foregoing **DEFENDANTS' OBJECTION TO, AND MOTION TO REVERSE IN PART AND MODIFY, THE SPECIAL MASTER'S ORDER GRANTING IN PART AND DENYING IN PART AUTO DEALER PLAINTIFFS' MOTION FOR PROTECTIVE ORDER CONCERNING RULE 30(B)(6) DEPOSITIONS OF AUTO DEALER PLAINTIFFS**, and supporting memorandum of law, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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